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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 530

[illegible]EKINS VAN LINES, INC.; CHEW CHICK, DOING BUSINESS AS BAY CITY HAULING CO.; KENNETH C. CLARK, ET AL., ETC., ET AL., APPELLANTS,

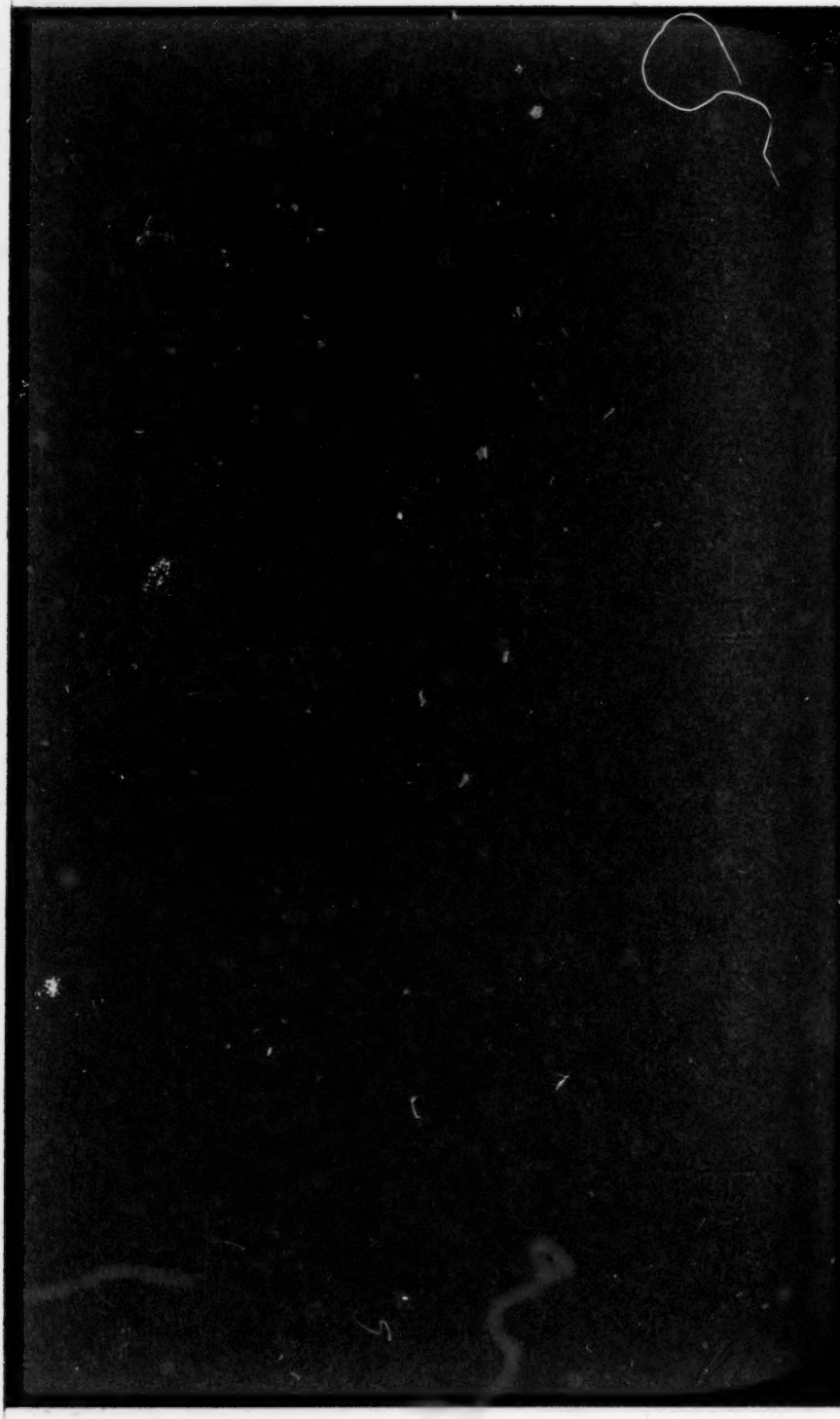
vs.

[illegible]AY L. RILEY, AS STATE CONTROLLER OF THE STATE OF CALIFORNIA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA

FILED NOVEMBER 5, 1939.

(33,839)



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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 29, 1928

[fols. a-1]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF CALIFORNIA.

No. 2159S

BEKINS VAN LINES, INC., a Corporation; CHEW CHICK, Doing Business as Bay City Hauling Co.; Kenneth C. Clark and Andrew B. Clark, Copartners, Doing Business as Clark Bros.; Coast Side Transportation Company, a Corporation; Frank De Marco, Doing Business as Frank De Marco Draying Co.; Dante Dianda, Doing Business as Half Moon Bay Draying Company; Highway Transport Co., a Corporation; Oakland San Jose Transportation Co., a Corporation; R. W. Rasmussen Co., Inc., a Corporation; San Francisco & San Jose Fruit & Produce Transfer Co., a Corporation; Antone Schivo, Joseph Schivo, and Peter Carcione, as Copartners, Doing Business Under the Name and Style of S. & G. Transfer Co.; Angelo Villanti, Doing Business as City Auto Drayage Co.; Alfred G. Witt, Doing Business as Al. G. Witt, and Kiso Yasunaga, Doing Business as Produce Transfer Co., Plaintiffs,

vs.

RAY L. RILEY, as State Controller of the State of California, Defendant

Action in Equity for Injunction to Restrain Collection of Highway Tax

BILL OF COMPLAINT—Filed July 21, 1928

Plaintiffs complain of defendant and for cause of action allege:

I

That at all times herein mentioned the legal status of each of the plaintiffs was and is as follows; that plaintiff, Bekins Van Lines, Inc., was and is a corporation duly organized and existing under and by virtue of the laws of the State of California, with its principal place of business [fol. 2] located in the City of Los Angeles, in the Southern

District of the said State of California; that plaintiff, Chew Chick was and is a citizen of the United States and a resident of Menlo Park in said Northern District of California, doing business, and sole proprietor of Bay City Hauling Co.; that plaintiff, Kenneth C. Clark, was and is a citizen of the United States and a resident of the City of Watsonville in said Northern District of California, that plaintiff Andrew B. Clark, was and is a citizen of the United States and a resident of the City of Watsonville in said Northern District of California, and that the two last named plaintiffs were and are copartners transacting business under the firm name and style of Clark Bros.; that plaintiff, Coast Side Transportation Company, was and is a corporation duly organized and existing under and by virtue of the laws of the State of California, with its principal place of business located in the City and County of San Francisco, in said Northern District of California; that plaintiff, Frank De Marco was and is a citizen of the United States and a resident of the city of San Jose, in said Northern District of California, doing business as, and sole proprietor of Frank De Marco Draying Co.; that plaintiff, Dante Dianda, was and is a citizen of the United States and a resident of the City and County of San Francisco, in said Northern District of California, doing business as and the sole proprietor of Half Moon Bay Draying Company; that plaintiff, Highway Transport Co., was and is a corporation duly organized and existing under and by virtue of the laws of the State of California, with its [fol. 3] principal place of business located in the City of San Jose, in said Northern District of California; that plaintiff; Oakland San Jose Transportation Co., was and is a corporation duly organized and existing under and by virtue of the laws of the State of California, with its principal place of business located in the city of Oakland, in said Northern District of California; that plaintiff R. W. Rasmussen Co., Inc., was and is a corporation duly organized and existing under and by virtue of the laws of the State of California, with its principal place of business located in the City of Oakland, in said Northern District of California; that plaintiff San Francisco & San Jose Fruit & Produce Transfer Co., was and is a corporation duly organized and existing under and by virtue of the

laws of the State of California, with its principal place of business located in the City and County of San Francisco, in said Northern District of California; that plaintiffs Antone Schivo and Joseph Schivo were and are citizens of the United States and residents of the city and County of San Francisco in said Northern District of California, that plaintiff, Peter Carcione, was and is a citizen of the United States and a resident of the City and County of San Francisco, in said Northern District of California, and that said three last named plaintiffs were and are copartners transacting business under the firm name and style of S. & G. Transfer Co.; that plaintiff, Angelo Villanti, was and is a citizen and subject of the kingdom of Italy and resident of the City and County of San Francisco, in said Northern District of California, doing business as, and the sole proprietor of City Auto Drayage Co.; that plaintiff Alfred G. Witt, was and is a citizen of the United States and a resident of the City and County of [fol. 4] San Francsco, in said Northern District of California, doing business as Al G. Witt; that plaintiff Kiso Yasunaga was and is a citizen and subject of the Empire of Japan and a resident of San Jose, in said Northern District of California, doing business as, and sole proprietor of Produce Transfer Co.

II

That at and during all the times herein mentioned each of the plaintiffs herein was and is and has been classed by the State Railroad Commission and the State Board of Equalization, respectively, of the State of California, as a common carrier transporting freight or property exclusively, over public highways in said state between fixed termini or over regular routes, for hires and as such classified common carrier each of them holds, and was and is operating over said public highways by virtue of, a certificate of public convenience and necessity issued by said State Railroad Commission, and as such classified common carrier each of said plaintiffs is subject to the operative limitations prescribed by the laws of said state and the rules and regulations of said Railroad Commission made in pursuance thereof, and particularly the Act of

May 10, 1917, being Chapter 213 of the 1917 Statutes of California entitled, "An act providing for the supervision and regulation of the transportation of persons and property for compensation over any public highway, by automobile, jitney, busses, autotrucks, stages and auto stages, etc.," and the Acts amendatory thereof.

[fol. 5] III

That at and during all of the times herein mentioned the defendant, Ray L. Riley, was and is a citizen of the United States and a resident of the City of Sacramento in said Northern District of California, and the duly elected, qualified and acting Controller of the State of California, and as such State Controller he was and is authorized, empowered and directed under the laws of said State to collect the highway taxes hereinafter mentioned, assessed and levied by the State Board of Equalization of said state to and against each of the plaintiffs herein.

IV

That on the 2nd day of November, 1926, there was adopted by the people of the State of California, at a general election held on said date, an amendment to the constitution of said state known and designated as Assembly Constitutional Amendment No. 37, proposed by the legislature of said state, filed in the office of the Secretary of State of California on the 27th day of April, 1925, and contained in Chapter 60, 1925 Statutes of California, and page lxxxviii, Statutes of 1927 of said state, identified as and becoming Section 15 of Article XIII of the Constitution of said State.

V

That said Section 15, Article XIII of said constitution among other things provides that the taxes levied, assessed and collected as therein provided upon companies owning, operating or managing any automobile, truck or auto truck, jitney bus, stage or auto stage used in the business of transportation of persons or property as a common carrier for compensation over any public highway in this state be-

[fol. 6] tween fixed termini or over a regular route, other than busses used exclusively for the transportation of pupils to or from any public school, when owned or operated by the school or school district, shall be entirely and exclusively for highway purposes, and shall be levied, assessed and collected in the manner therein provided; and that the word "companies" as used in said section shall include persons, partnerships, joint stock associations, companies and corporations; and that companies engaged in the business of transportation of persons, or persons and baggage, or persons and express, or persons, baggage and express where the same is transported on the same automobile, jitney bus, stage or auto stage transporting said persons shall annually pay to the state a tax upon their franchises, car, equipment, and other property, or any part thereof, used exclusively in the operation of their business in said state, equal to four and one quarter per cent of the gross receipts from operations of such companies, and each thereof, within said State; and that all such companies operating trucks or auto trucks engaged in the business of transporting property shall annually pay to the state a tax upon their franchises, trucks or auto trucks, equipment, and other property, or any part thereof, used exclusively in the operation of their business in this state, equal to five per cent of the gross receipts from operations of such companies, and each thereof, within said State; and that said Section 15 of Article XIII is hereby specially referred to and made part of this bill of complaint as fully as if set forth herein; and that each of the plaintiffs herein is and all of them are, as classified common carriers of freight or property for compensation between fixed termini or over [fol. 7] regular routes over the said public highways, subject to assessment and levy of said highway tax of (5%) five per centum of their gross annual receipts.

VI

That is order to carry into effect and to fully enforce the said constitutional amendment the legislature of said state duly passed an act at the 1927 session thereof entitled: "An act to add three new sections to the Political Code to be numbered three thousand six hundred sixty-four

aa, three thousand six hundred seventy bb and three thousand six hundred seventy cc, relating to taxation of highway transportation companies for state purposes," which act was duly approved by the Governor of said state on the 5th day of March, 1927, and went into effect immediately; said act being Chapter 19 of the 1927 Statutes of California, and which act is hereby specially referred to and made part of this bill of complaint as fully as if set forth herein.

VII

That said constitutional amendment and the said act, provide, among other things, that the taxes to be assesed, levied and collected as therein provided shall be entirely and exclusively for highway purposes; that said taxes shall be assessed and levied by the Board of Equalization of California and shall be collected by the State Controller; that said taxes shall be in lieu of all other taxes and licenses, state, county and municipal upon the property of the common carriers hereinbefore described used exclusively in the operation of their transportation business in said state; provided that nothing therein shall be construed to release such common carrier from the payment of any amount re- [fol. 8] quired to be paid for any special privilege or franchise theretofore granted by any of the municipal authorities of said state; that revenues derived from said taxes shall be deposited in the general fund of said state; that one-half thereof are appropriated and set aside to said state to be devoted exclusively to the maintenance and repair of public highways within the State and that the remaining one-half thereof shall be apportioned among and distributed to the respective fifty-eight counties of said state in the proportion that the number of motor vehicles registered within each county for the proceding calendar year bears to the total number of motor vehicles registered in said state, and the sums so paid to said counties shall be devoted exclusively to the maintenance and repair of public highways within said counties; that the gross receipts upon which said taxes shall be computed shall be the gross receipts for the calendar year preceding the year in which said assessment and levy are made and that said taxes shall become a lien on all of the property covered by said tax on the first

Monday in March of each year after the adoption of said constitutional amendment and shall become due and payable annually on the first Monday in July thereafter; that certain enumerated sections of the Political Code of said state already in effect shall apply and be construed to apply to all common carriers subject to said tax, with the same force and effect as if said common carriers were therein expressly mentioned.

VIII

That said highway taxes provided for by said constitutional amendment are assessed and levied against, and the collection of said tax is limited to, only common carriers transporting persons or property for compensation over [fol. 9] any public highway in the state between fixed termini, or over a regular route, excluding school busses when operated by school districts, and are not intended to apply and do not apply and have not been applied to common carriers not operating over fixed termini or over a regular route, transporting persons or property for compensation over any public highway in the state, nor to exclusive contract or private carriers operating for compensation over the same highways, nor to any other class of carriers using said highways; and that such common carriers not operating over fixed termini or over regular routes and such contract or private carriers and all other classes of carriers using said highways are entirely excluded from the payment of said highway taxes and pay no state taxes other than a corporate franchise tax assessed on the basis of the full cash value of such corporate franchise, if they be corporations, but not otherwise, license taxes hereinafter more particularly mentioned, and in addition thereto local, county and municipal taxes hereinafter more particularly mentioned.

IX

That the major portion of the transportation business of most of plaintiffs herein is limited to the transportation of farm products consisting of fruits and vegetables, mostly perishable, grown in the Santa Clara, Watsonville, Pajaro, Salinas and adjacent valleys situated south of San Francisco Bay, to the San Francisco fruit and produce commis-

sion market; that because of the nature of the commodities transported and the necessity for rapid transit said commodities are picked up and loaded on the farms, ranches and orchards where produced and carried into the San Francisco market over the public highways usually between [fol. 10] sunset and sunrise to the great advantage and convenience of producer, middleman and consumer and is a service that could not be so rendered by any other existing form of carrier; that the busiest season of the year for plaintiffs and all other common and contract or private carriers operating within said state over the public highways, commences in the late spring and ends in the early fall; that principally during said season of the year and also in a less degree at other times, a large number of motor vehicle common carriers and contract or private carriers, to the extent of at least five hundred operators transporting property for hire over the public highways in California, that do not come within the definition of the common carriers taxed under said constitutional amendment and said act, enter into direct and keen competition with the various plaintiffs herein in the transporting of commodities or property over the public highways of said state; that said common and contract or private carriers not subject to said highway tax are also not subject to regulations as to routes, termini, period of operation, or in any other respect by the State Railroad Commission or any other public state authority, and are not required and do not pay an average annual total of local, municipal, county and state taxes and licenses, excepting none, and of every kind combined, in excess of twenty-five per centum (25%) or one-fourth (¼) of the amount of the gross receipts or highway tax required to be paid annually by the respective plaintiffs herein where said plaintiffs and the said excluded or non-taxable carriers each use exclusively in said business over the same routes and in direct competition under like conditions, a total taxable operative property of equal full cash or assessable value; that the same average difference between all combined taxes and licenses of every kind as aforesaid required to be paid [fol. 11] by all carriers not subject to said highway tax and common carriers subject to said highway tax operating over competitive routes, with taxable operative property of

equal full cash or assessed value, prevails throughout the State of California, namely, that said common carriers operating in California subject to said highway tax are thereby assessed and obligated to pay an average of four times the amount of taxes, notwithstanding their exemptions from all other kinds of taxes, that all other highway carriers for compensation not subject to said tax are assessed and obligated to pay for all local municipal, county and state taxes and licenses of every kind combined; that the average full cash value of operative property, that is to say, of all property used exclusively in said business of carrier, of all common carriers and of all private or contract carriers that operate over the public highways of California carrying property for compensation is not in excess of one-fourth (¼) or twenty-five per centum (25%) of the average annual gross receipts derived from such business by said carriers.

X

That the average total annual rate or percentage of taxes that carriers not subject to said highway tax operating for hire on the public highways of said state are obliged to pay, which percentage includes all local, municipal, county and state taxes and licenses of every kind combined, does not exceed five per centum (5%) of the full cash or assessable value of said property used exclusively in the operation of the business of carriers as aforesaid, and that said rate or percentage would apply to plaintiffs herein on their property used exclusively in the operation of the business of carriers if said highway tax were not assessed, levied and enforced.

[fol. 12]

XI

That said gross receipts tax is purely and solely a tax for highway purposes apportioned between the state and the various counties of the state of California to be devoted exclusively to the maintenance and repair of public highways; that the aforesaid competitiors of plaintiffs operating as contract or private carriers and common carriers of property for hire over the said public highways not subject to said tax use the said public highways in the same manner, to the same degree, with same type of ve-

hicles, employ the same methods of operation and have the same source of receipts as the plaintiffs and are in direct and keen competition with plaintiffs; and that said tax is therefore arbitrary, oppressive, unjust, unlawful, illegal, discriminatory and burdensome, and is not justified by reason of any difference in the source of receipts or in the situation or character of the property employed by the common carriers subject to the tax and by those carriers for hire not subject to the tax, and it is therefore class legislation and denies to the plaintiffs the equal protection of the laws in violation of Section 1, Article XIV of the Amendments to the Constitution of the United States.

XII

That the common carriers subject to said tax are subject to control by said Railroad Commission as to termini and routes, kind of transportation carried, class of vehicles used, term or period of operation and other similar regulations while said competitive common carriers and contract or private carriers not subject to said tax using said public highways for hire are free from said limitations, restrictions and regulations, thus affording the latter classes of carriers freedom of action with respect to choice of business, routes, seasonal operations and all other regulations [fol. 13] enforced by said State Railroad Commission against plaintiffs, which liberty of action said classes of carriers do now freely exercise, and which the plaintiffs herein do not possess and do not and cannot exercise, and the said non-taxable classes of carriers for hire are permitted to and do use and enjoy, and derive their income exclusively from the use and enjoyment of said public highways without paying any part or portion of the said highway tax or without contributing in any manner toward the maintenance or repair of said public highways beyond what all owners and operators of motor vehicles that do not enjoy or use said public highways as carriers for hire contribute toward their maintenance and repair, to the unfair and great injury and damage of plaintiffs and which will, if allowed to continue, amount to a confiscation of the property and business of the plaintiffs and render plaintiffs insolvent; and that said highway tax is thereby made a double burden on the free and equal competition of plain-

tiffs with said carriers for hire not subject to said tax and is an unlawful, void and illegal tax and unjustly discriminates against plaintiffs thereby denying to the plaintiffs the equal protection of the laws in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

XIII

That betwe-n the first Monday in March, 1928, and the third Monday before the first Monday in July, 1928, the State Board of Equalization of California, in the manner provided by law, assessed and levied against each of the plaintiffs herein the aforesaid highway tax of five per centum (5%) of the gross receipts derived from operations by each of them during the preceding year, said tax being [fol. 14] for and covering the fiscal year beginning July 1, 1928, and ending June 30, 1929, in the respective amounts as follows, to wit: Bekins Van Lines, Inc., a corporation, $11,780.38; Chew Chick doing business as Bay City Hauling Co., $502.88; Kenneth C. Clark and Andrew B. Clark as copartners transacting business under the firm name and style of Clark Bros., $5688.84; Coast Side Transportation Company, a corporation, $2,137.92; Frank De Marco doing business as Frank De Marco Draying Co., $1500.00; Dante Dianda doing business as Half Moon Bay Draying Company, $459.36; Highway Transport Company, a corporation, $7371.90; Oakland San Jose Transportation Co., a corporation, $2,609.26; R. W. Rasmussen Co., Inc. a corporation, $3,208.54; San Francisco & San Jose Fruit & Produce Transfer Co., a corporation, $1,315.70; Antone Schivo, Joseph Schivo and Peter Carcione as copartners transacting business under the firm name and style of S. & G. Transfer Co., $669.68; Angelo Villanti doing business as City Auto Drayage Co., $221.76; Alfred G. Witt doing business as Al G. Witt, $881.06 and Kiso Yasunaga doing business as Produce Transfer Co., $2,127.32, and that thereafter and prior to the commencement of this action in equity the said defendant Ray L. Riley, as Controller of the State of California, acting under authority vested in him by the laws of said state, notified the plaintiffs and each of them that unless they paid, prior to the second day of July, 1928, the aforesaid taxes so assessed and levied, that

he would under the said authority vested in him, seize and sell at public auction a sufficient amount of the property of plaintiffs to pay said taxes with penalties and costs accruing.

[fol. 15]

XIV

That none of the plaintiffs has paid the aforesaid tax or any part thereof and that they have refused to pay same because they verily and conscientiously believe and have been advised and therefore allege that said tax is an unjust and illegal discrimination against them and that Section 15, Article XIII of the Constitution of California and the said Statute enacted to carry same in effect are violative of Section 1 of the Fourteenth Amendment to the Constitution of the United States and are therefore void and illegal and that the assessment, levy and attempt and threat to enforce the payment of said tax are all unlawful, void and illegal; that said defendant ever since the second day of July, 1928, has threatened, and does now continue to threaten, to seize the property and equipment of the plaintiffs and to sell the same at public auction in order to realize a sum sufficient to pay the aforesaid taxes with penalties and costs and will do so unless immediately enjoined and restrained.

XV

That plaintiffs have no plain, speedy and adequate or complete remedy at law, and unless defendant is immediately enjoined and restr-ined from seizing and selling the property of plaintiffs to enforce the collection of said taxes the plaintiffs will suffer irreparable injury and damage and will be deprived of their property without due process of law in violation of Section 1 of the Fourteenth Amendment to said Constitution of the United States in manner following, to wit:

XVI

That the plaintiffs are afforded the right by statute to pay said taxes under protest on the ground of illegality and to thereafter bring suit against the Treasurer of the [fol. 16] State of California for the recovery of such taxes; that no provision is made for the payment of interest on

such taxes paid under protest during the pendency of such suit; that no provision is made by law for the payment of any judgment so recovered; that such judgment cannot be collected by execution against the state or its property or by any of the ordinary processes of law provided for the enforcement of judgments; that no provision for the payment of such judgment so recovered can be made except by specific and separate appropriation and legislation by the legislature of said state in such manner and at such time as it sees fit and that it may at its pleasure refuse to do so; that said taxes are required to be paid into the general fund of said state and within three months thereafter one-half the amount of said collected taxes is required to be apportioned and distributed among the fifty-eight counties of said state; that said taxes could not therefore be traced and refunded by said state treasurer if he had the legal authority to do so in satisfaction of any judgment so recovered; that to recover the one-half of said taxes paid to said counties the plaintiffs would be obliged to institute separate and distinct suits against said counties thereby causing a multiplicity of suits; that the integrity and success of the business of plaintiffs depends upon a continuity of service and that if said property of plaintiffs is seized and sold at public auction by said defendant, plaintiffs will be deprived of the opportunity to transact business therewith and their routes, patronage and business will be thereby wholly disrupted, destroyed and lost beyong recovery or rehabilitation; that no relief or satisfaction in damages could be obtained against said defendant to compensate plaintiffs for the loss of their property, routes, [fol. 17] patronage and business, and it would be extremely difficult to compute or estimate the amount of such damages; that if said taxes are not paid on or before the sixth Monday after the first Monday in July, 1928, one-half the amount thereof is subject to a penalty equal to fifteen per centum (15%) of the amount thereof and will be added thereto, and an additional penalty of five per centum (5%) will be added to the amount remaining unpaid on the first Monday in February, 1929; that if said taxes are not paid on or before the Saturday preceding the first Monday in March, 1929, the plaintiffs herein that are corporations will have their respective corporate rights, powers and priv-

ileges suspended and thereafter will be incapable of exercising the same.

XVII.

That the amount of tax fairly and equitably due from each of the plaintiffs herein is twenty-five per centum (25%) of the respective amounts assessed, levied and attempted to be collected from each of said plaintiffs herein as hereinbefore alleged; and that said plaintiffs are ready, willing and able, and each of them does hereby offer to pay into court a fair, just and non-discriminatory tax in the premises which plaintiffs allege to be said twenty-five per centum (25%) of said respective annual gross receipts taxes, upon the granting of an injunction herein.

Wherefore plaintiffs pray for a judgment and decree of this Honorable Court enjoining and restraining the said defendant Ray L Riley as Controller of the State of California, his agents, deputies or assistants during the pendency of this action and until further order of the Court, [fol. 18] from taking any steps, action or proceedings of any kind or nature to enforce or compel the plaintiffs or any of them to pay or discharge the highway tax or any part thereof, mentioned and described in the bill of complaint herein and as assessed and levied under said Article XIII, Section 15 of the Constitution of the State of California and the said statute enacted to carry same into effect; that on final hearing or trial of this action said constitutional amendment and said statute giving efficacy thereto be declared in violation of the Fourteenth Amendment of the Constitution of the United States and null and void and of no force and effect and that said defendant be perpetually enjoined and restrained from collecting said taxes or any portion thereof from plaintiffs; for their costs and disbursements of suit and for general relief in equity, and that subpœn-s issue accordingly.

Samuel T. Bush, Attorney and Solicitor for Plaintiffs.

[fols. 19 & 20] *Duly sworn to by Alfred G. Witt. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 21] IN UNITED STATES DISTRICT COURT

NOTICE OF MOTION FOR INTERLOCUTORY INJUNCTION—Filed July 21, 1928

To Ray L. Riley, as State Controller, defendant above named, and to the Hon. C. C. Young, as Governor of the State of California, and to U. S. Webb, Esq., as Attorney General of said State:

You and each of you will please take notice that the above named plaintiffs will make an application or motion for an order granting said plaintiffs an interlocutory or temporary injunction, pending the hearing and final determination of the above entitled cause, before two District Judges and one Circuit Judge, sitting en banc, in the court room of said Court at the United States Courthouse and Postoffice Building, corner Seventh and Mission Streets in the City and County of San Francisco, in said District, on Monday, July 30, 1928, at ten o'clock A. M., of said day, or as soon thereafter as counsel may be heard, enjoining and restraining the said defendant, his agents, deputies or assistants, from taking any steps, action or proceedings of any kind or nature to enforce or compel plaintiffs or any of them to pay or discharge the highway taxes mentioned and described in the bill of complaint on file in said Court, a copy of which bill of complaint, together with Plaintiffs' Points and Authorities, is hereto attached and served herewith.

Said motion will be made on the ground that said tax is discriminatory and not assessed or levied against common [fol. 22] carriers not operating over fixed termini or a regular route, and is not assessed or levied against private carriers, that carry property for compensation over the public highways of California, and that such excluded carriers do not pay an equivalent in other taxes, or any highway tax; and that the assessment, levy and collection of said tax is in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States as more particularly appears in the copy of the verified bill of complaint hereto attached and made part of this notice of motion.

Said motion will be based on the said verified bill of complaint on file herein, and on such testimony of witnesses

taken orally in open court, as may be required and on the entire papers on file herein, including this notice of motion.

Samuel T. Bush, Attorney and Solicitor for Plaintiffs.

Dated July 20, 1928.

[File endorsement omitted.]

[fol. 23] IN UNITED STATES DISTRICT COURT

ADMISSION OF SERVICE OF NOTICE OF MOTION FOR INTERLOCUTORY INJUNCTION, ETC.—Filed July 23, 1928

We hereby admit due service of Notice of Motion by Plaintiffs for Interlocutory Injunction in the above entitled cause, and receipt of a copy of (1) Bill of Complaint, (2) said Notice of Motion and (3) Plaintiffs' Points and Authorities therein.

C. C. Young, Governor of the State of California.
U. S. Webb, Attorney General of the State of California.

Dated July 21, 1928.

(Endorsed:) Receipt of copy of the within Admission of Service of Notice of Motion acknowledged this 21st day of July, 1928. U. S. Webb, Attorney for Defendant. Frank L. Guerena, Deputy.

[File endorsement omitted.]

[fol. 24] IN UNITED STATES DISTRICT COURT

OPPOSITION TO APPLICATION FOR INTERLOCUTORY INJUNCTION —Filed July 28, 1928

To the Honorable the Judges of the United States Circuit Court of Appeals and to the Judges of the District Court of the United States in and for the Southern Division of the Northern District of California:

Now comes Ray L. Riley, as State Controller of the State of California, the defendant named in the above entitled proceeding, and opposes the application herein made by the above named complainants for an interlocutory injunction on the following grounds:

I

That the bill of complaint on file herein does not show that the complainants will suffer any irreparable injury and damage as a consequence of the performance of any or all of the acts sought to be enjoined.

II

That the granting of the interlocutory injunction applied for will seriously injure and embarrass the State of California in the administration of its revenue laws and in the conduct of its governmental affairs.

III

That the assessments and levies against the complainants are valid.

[fol. 25]

IV

That Section 15 of Article XIII of the Constitution of California is not contrary to the Fourteenth Amendment or to any provision of the Constitution of the United States in that its terms apply only to companies owning, operating or managing any automobile, truck or auto truck, jitney bus, stage or auto stage used in the business of transportation of persons or property as a common carrier for compensation over any public highway in California between fixed termini or over a regular route, other than busses used exclusively for the transportation of pupils to or from any public school, when owned or operated by the school or school district.

This opposition is made and is based upon complainants bill of complaint, upon the motion to dismiss filed by defendant herein, upon notice of said motion, upon the points and authorities filed in conjunction with said motion and upon all of the papers and records on file herein.

Wherefore defendant prays that complainants, and each of them, be denied the whole and every part of the relief sought by their bill.

Ray L. Riley, Defendant Above Named. U. S. Webb, Attorney General of the State of California; Frank L. Guerena, Deputy Attorney General, Attorneys for said Defendant.

[fol. 26] Receipt of the copy of the within Opposition to Application for Injunction is hereby acknowledged this 28th day of July, 1928.

—— ——, Attorney for Plaintiffs.

[File endorsement omitted.]

[fol. 27] In United States District Court

Motion to Dismiss Bill of Complaint

Now comes Ray L. Riley, as State Controller of the State or California, named as defendant in the above entitled proceeding and moves the above entitled court to dismiss the bill of complaint filed herein on the following grounds:

I

That said bill of complaint does not state facts sufficient to constitute a cause of action against said defendant, or to entitle complainants, or any of them, to the whole or any part of the relief prayed for in said bill.

II

That this court has no jurisdiction of the subject of this proceeding, or of the above named defendant, or of the State of California.

III

That there is a defect of parties plaintiff in that the several plaintiffs are not properly joined.

IV

That there is a misjoinder of parties plaintiff in that the plaintiffs are not properly joined.

V

That several alleged causes of action have been improperly united.

This motion is also based upon the said bill of complaint, the notice of motion and upon all of the papers and records [fols. 28-32] on file in the above entitled proceeding.

Dated July 27, 1928.

U. S. Webb, Attorney General of the State of California; Frank L. Guerena, Deputy Attorney General, Attorneys for Defendant, Ray L. Riley, as State Controller of the State of California.

[fols. 33 & 34] In United States District Court

[Title omitted]

Amended Order and Decree Refusing Plaintiffs' Motion for an Interlocutory Injunction and Granting Defendant's Motion to Dismiss—Filed Aug. 10, 1928

By the Court:

Plaintiffs' motion for an interlocutory injunction and defendant's motion to dismiss, respectively, came on regularly to be heard on the 30th day of July, 1928, at this term, before Wm. H. Hunt, Circuit Judge and A. F. St. Sure and Frank H. Kerrigan, District Judges, and were argued by respective counsel for plaintiffs and defendant; and thereupon, on consideration thereof, it was ordered, adjudged and decreed and this Court does hereby order, adjudge and decree, as follows, towit:

That plaintiffs' motion for an interlocutory injunction be, and the same is hereby denied and that defendant's motion to dismiss be, and the same is hereby granted.

W. H. Hunt, Circuit Judge. A. F. St. Sure, D. J. Frank H. Kerrigan, D. J.

Dated July 31, 1928.

[File endorsement omitted.]

[fol. 35] In United States District Court

Order Allowing Appeal and Fixing Bond—Filed Sept. 8, 1928

The foregoing petition on appeal is granted and the claim of appeal therein made is allowed. It is further ordered that the bond on appeal be fixed at the sum of three hundred ($300) dollars, the same to act as a bond for costs and damages on appeal.

Done in open court this 8th day of September, 1928.

A. F. St. Sure, U. S. District Judge and one of the judges presiding in the above-entitled cause.

[File endorsement omitted.]

[fol. 36] In United States District Court

Assignment of Errors—Filed Sept. 8, 1928

Now come the plaintiffs above named and file the following assignment of errors upon which they and each of them will rely in the prosecution of their appeal in the above entitled cause from the order and decree made by this Honorable Court, and filed and entered on the 10th day of August, 1928, in the above entitled cause:

The said United States District Court erred in making the order and decree refusing the interlocutory injunction prayed for by the plaintiffs herein and in granting defendant's motion to dismiss the bill of complaint in this cause, for the following reasons, towit:

I

That said Court erred in holding and deciding that plaintiffs' bill of complaint does not state facts sufficient to constitute a cause of action against the defendant herein or to entitle plaintiffs or any of them to the whole or any part of the relief prayed for in said bill.

II

That said Court erred in holding and deciding that it had no jurisdiction of the subject of the proceedings or of the above named defendant or of the State of California.

III

That said Court erred in holding and deciding that there is a defect of parties plaintiff in that the several plaintiffs are not properly joined.

[fol. 37]

IV

That said Court erred in holding and deciding that there is a misjoinder of parties plaintiff in that the said plaintiffs are not properly joined.

V

That said Court erred in holding and deciding that several alleged causes of action have been improperly united.

VI

That said Court erred in holding and deciding that the plaintiffs' bill of complaint on file herein does not show that the plaintiffs will suffer any irreparable injury and damage as a consequence of the performance of any or all of the acts sought to be enjoined.

VII

That said Court erred in holding and deciding that the granting of the interlocutory injunction applied for will seriously injure and embarrass the State of California in the administration of its revenue laws and in the conduct of its governmental affairs.

VIII

That said Court erred in holding and deciding that the assessments and levies against the plaintiffs are valid.

IX

That said Court erred in holding and deciding that Section 15 of Article XIII of the Constitution of the California is not contrary to the Fourteenth Amendment or any provision of the Constitution of the United States.

[fol. 38]

X

That said Court erred in holding and deciding that Section 15 of Article XIII of the Constitution of the State of California and Chapter 19 of the 1927 Statutes of California enacted to carry said section of said state constitution into effect are not discriminatory or arbitrary or oppressive or unlawful or illegal or unconstitutional or burdensome notwithstanding that said section of said state constitution and said statute enacted to carry same into effect apply only to common carriers operating for compensation between fixed termini or over regular routes over the public highways of said State of California, and do not apply to all other classes of common carriers and to private or contract carriers using the said public highways under like conditions and in competition with the plaintiffs herein.

XI

That said Court erred in holding and deciding that Section 15 of article XIII of the Constitution of the State of California, and Chapter 19 of the 1927 Statutes of California enacted to carry said section of said state constitution into effect are not discriminatory or arbitrary or oppressive or unlawful or illegal or unconstitutional or burdensome notwithstanding that said section of the constitution of said state and said statutes enacted to carry same into effect provide that and require the plaintiffs to pay in taxes a sum equal to an average of four times the amount of local, county, municipal and state taxes and licenses of all kind combined exacted from and required to be paid by their competitior carriers excluded from the aforesaid constitutional and statutory classification and using said public highways as such carriers under like con-
[fol. 39] ditions, in competition with the plaintiffs herein.

XII

That said Court erred in holding and deciding that the five per centum gross receipts highway tax provided for in said section of the said state constitution and in said Chapter 19 of the 1927 Statutes of California and the assessment and levy thereof made against the plaintiffs

herein, and the attempt to enforce the collection thereof against said plaintiffs and their property are not a double or discriminatory burden on the free and equal competition of the plaintiffs herein with all classes of carriers for compensation not subject to said tax and using the said public highways in competition with said plaintiffs.

XIII

That said Court erred in holding and deciding that the plaintiffs have a plain, speedy and adequate or complete remedy at law.

XIV

That said Court erred in holding and deciding that the enforcement of said state constitutional amendment and the aforesaid statute enacted to carry same into effect and the collection of said tax would not deprive plaintiffs of their property without due process of law.

Wherefore the said plaintiffs and appellants pray that the order and decree of this Court may be reversed and that said defendant be perpetually enjoined and restrained from collecting any taxes under the provisions of the said section of the state constitution of California and of any [fols. 40-48½] statutes enacted to carry same into effect and for such other and further disposition to be made in the premises as may be in accordance with law and the statutes of the United States in such cases made and provided.

Samuel T. Bush, Solicitor for Plaintiffs and Appellants.

[File endorsement omitted.]

[fol. 49] IN SUPREME COURT OF THE UNITED STATES

APPELLANTS' STATEMENT OF POINTS RELIED ON AND PARTS OF RECORD NECESSARY FOR CONSIDERATION THEREOF—Filed Nov. 13, 1928.

To Charles Elmore Cropley, Esq., Clerk of the above-entitled Court:

The appellants herein hereby designate the points upon which they will rely in the prosecution and presentation of their appeal in this cause, as follows, towit:

Said appellants rely on each and all of the points specifically mentioned and set forth in Paragraphs I, II, II, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII and XIV of Appellants' Assignment of Errors on file herein.

Said points are grouped into three major points as follows:

(1) That the bill of complaint states a cause of action for equitable relief.

(2) That the United States District Court had jurisdiction of the parties and of the subject of the proceedings.

(3) That Section 15, Article XIII of Constitution of [fol. 50] California and Chapter 19 of the 1927 Statutes of California enacted to carry into effect said Section 15 of Article XIII are discriminatory, arbitrary, oppressive and illegal and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that they deny to appellants the equal protection of the laws and deprive appellants of their property without due process of law.

The parts of the record which the appellants deem necessary for the consideration of the foregoing points are:

(a) Plaintiffs verified bill of complaint,

(b) Notice of Motion for Interlocutory Injunction,

(c) Admission of service of Notice of Motion for Interlocutory Injunction by Honorable C. C. Young, Governor, and U. S. Webb, Attorney General of the State of California,

(d) Defendant's opposition to Motion for Interlocutory Injunction,

(e) Defendant's Motion to Dismiss plaintiffs' bill of complaint,

(f) Assignment of Errors.

Respectfully submitted.

William Sea, Jr., Solicitor for Appellants.

Dated this 8th day of November, 1928.

[fol 51] Receipt of Copy within Statement of Points Relied On, etc., together with copy of Præcipe of Appearance of Wm. Sea, Jr., acknowledged this 8th day of November, 1928.

W. S. Webb, Attorney General, Attorney for Appellee.

[fol. 52] [Filed endorsement omitted.]

Endorsed on cover: File No. 33,839. N. California D. C. U. S. Term No. 530. Bekins Van Lines, Inc., Chew Chick, doing business as Bay City Hauling Co.; Kenneth C. Clark, et al., etc., et al., appellants, vs. Ray L. Riley, as State Controller of the State of California. Filed November 5th, 1928. File No. 33,839.

(3035)